WESTERN ENERGY ALLIANCE

Submitted via regulations.gov

June 20, 2023

Administrator Richard Revesz
Office of Information and Regulatory Affairs
Office of Management and Budget
Executive Office of the President
1600 Pennsylvania Ave NW
Washington, DC 20500

Re: OMB Proposed Circular No. A–4 Updates; Docket ID No. OMB-2022-0014

Dear Administrator Revesz:

The proposed revisions to the Office of Management and Budget's (OMB) Circular No. A-4 (proposed revisions) are aimed at characterizing costs and benefits of potential rulemakings in the face of a level of immense uncertainty in the near-term and extreme unpredictability into the future. Western Energy Alliance recognizes the importance of regulatory analysis and its potential to drive policymaking towards those regulatory actions which produce the most economically efficient results for the greatest net public benefit. While the intent of the proposed revisions is to better quantify proposed costs and benefits of regulatory actions, it instead shifts the focus away from economic efficiency and towards more complex and opaque measures. While improvements and updates to methodologies and quantification may be warranted in a potential revision to Circular A-4, any updates should not fundamentally shift the purpose and scope of the Circular and associated regulatory analyses.

Western Energy Alliance represents 200 member companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in the West. Alliance members are often the regulated entity subject to analysis at the direction of OMB Circular A-4.

The Alliance has taken a particular interest in the revision of this Circular because we believe that American oil and natural gas provide an overwhelming net benefit to human health, safety, and welfare. Our products are the key to modern human welfare. If regulatory actions constrain, limit, or make uneconomic development of American oil and natural gas, a disproportionate and wholly unnecessary level of human suffering would result due to the loss of affordable energy and the vast array of petroleum-derived products, which include pharmaceuticals, eyeglasses, clothing, solar panels, wind turbines, and anything with a computer chip, just to name a few.

Certain aspects of the proposed revisions skew the evaluation of regulatory costs and benefits away from the most economically efficient by underestimating the near-term

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costs and negative impacts while simultaneously overestimating and overweighting the future benefits. The proposed revisions would alter policymaking decisions in a way that would result in less net public benefit than if the Circular were to remain unchanged by inappropriately justifying costly near-term actions through future benefits that are, at best, entirely uncertain in timing and value.

OMB Should Require Agencies to Identify and Limit the Influence of Ancillary and Indirect Impacts

The preamble states that, "a terminological change from discussion of 'ancillary benefits and countervailing risks' to 'additional benefits and costs' has been proposed to clarify that categories of effects such as 'ancillary' or 'indirect' are not meaningfully different for analytical purposes from categories of effects that are 'primary' or 'direct'". The preamble gives little justification for this supposition. In the current version of Circular A-4, ancillary benefits and countervailing risks are defined as:

> *"An **ancillary benefit** is a favorable impact of the rule that is typically unrelated or secondary to the statutory purpose of the rulemaking (e.g., reduced refinery emissions due to more stringent fuel economy standards for light trucks) while a **countervailing risk** is an adverse economic, health, safety, or environmental consequence that occurs due to a rule and is not already accounted for in the direct cost of the rule (e.g., adverse safety impacts from more stringent fuel-economy standards for light trucks)."*
> [emphasis added]

Further in the preamble, "We solicit comment and feedback on all of these proposed revisions, including on how to ensure that unquantified and non-monetized effects are given appropriate attention in the analysis, such as through summary tables with categories or rank ordering." The existence of this question is evidence as to why ancillary benefits and countervailing risks are not equivalent to primary and direct impacts. Direct impacts are easily identified and generally straightforward to evaluate and quantify, while ancillary benefits and countervailing risks are often not easily identified in totality and more elusive to quantify. In fact, typically ancillary and indirect effects assume other, non-certain external non-regulatory action. These assumptions are far less certain than the direct and primary impacts of a regulatory action, and as such should not be granted the same weight and certainty within a regulatory analysis. The current Circular A-4 appropriately handles these impacts, stating:

> *"Like other benefits and costs, an effort should be made to quantify and monetize ancillary benefits and countervailing risks. If monetization is not feasible, quantification should be attempted through use of informative physical units. If both monetization and quantification are not feasible, then these issues should be presented as non-quantified benefits and costs.*

> *The same standards of information and analysis quality that apply to direct benefits and costs should be applied to ancillary benefits and countervailing risks."*

When discussing the potential for inclusion of some ancillary impacts within the cost benefit analysis, the current Circular A-4 clarifies further:

> *"When you can estimate the monetary value of some but not all of the ancillary benefits of a regulation, but cannot assign a monetary value to the primary measure of effectiveness, you should subtract the monetary estimate of the ancillary benefits from the gross cost estimate to yield an estimated net cost. (This net cost estimate for the rule may turn out to be negative B that is, the monetized benefits exceed the cost of the rule.) If you are unable to estimate the value of some of the ancillary benefits, the cost-effectiveness ratio will be overstated, and this should be acknowledged in your analysis."*

The current Circular A-4 handles ancillary benefits and countervailing costs more appropriately than the proposed revisions, because without these explanatory provisions, an audience evaluating a regulatory analysis will have no knowledge that hard-to-quantify and potentially unbalanced costs or benefits could be essentially hidden in the cost-benefit justification of the rule. Not only does this severely hinder reproducibility, which will be addressed later in these comments, it is also a significant barrier to transparency. In the wrong hands, an agency could essentially quantify and monetize a select subset of costs or benefits of a rulemaking, while not quantifying another subset, making a rulemaking appear to be the best economic alternative, when it could result in significantly less net welfare than other alternatives, and the reader or evaluator would have no way of knowing the difference.

> **Recommendation**: Retain the current treatment of ancillary benefits and countervailing risks or at a minimum ensure that those sorts of less-certain quantifications are kept separate from the direct impacts of a regulatory action.

OMB Should Not Use Distribution of Impacts to Adjust the Regulatory Analysis through Distributional Weighting

With respect to distributional analysis, the Alliance appreciates the efforts to show that impacts on lower-income groups are often higher, even when the dollar amount of the cost to each income group is the same. The Alliance has frequently argued that regulatory actions that increase energy costs impact low-income groups the hardest. Distributional analyses are particularly useful for understanding how regressive certain regulatory actions may be, even if they are considered to have a net benefit to society overall.

However, the proposed revisions intend to use this distributional analysis to skew the overall regulatory analysis through assignment of distributional weights, ultimately removing clarity and transparency from the analysis. In doing so, the proposed revisions conflate actual cost dollar values with adjusted utility weight dollar values, which in many situations would result in an analysis that would not "provide decision makers with a clear indication of the most efficient alternative," as the current Circular A-4 instructs. In fact, adding distributional weighting would essentially allow for distributional effects to be considered in duplicate.

Regulatory impact analysis should be designed to identify the economically efficient alternatives for accomplishing a specific statute-directed result, irrespective of distributional and other effects. A regulatory agency, at the direction of Congress or through its own evaluation can select alternatives that maximize net benefits, "including on potential economic, environmental considerations, public health and safety, and other advantages; distributive impacts; and equity" as directed in Executive Order 12866.

> **Recommendation**: Due to the risk of inaccuracy in reporting costs and benefits, OMB should direct agencies to perform distributional analysis separately from the cost-benefit analysis in order to provide policymakers with the most accurate and transparent information for decision making.

OMB Should Report International Benefits and Costs Separately from Domestic Effects

The proposed revisions address international impact analysis that can result both directly from domestic applicability or indirectly in the form of costs and market transactions. However, the current Circular A-4 maintains a simpler approach for the scope of analysis, stating:

> *"Your analysis should focus on benefits and costs that accrue to citizens and residents of the United States. Where you choose to evaluate a regulation that is likely to have effects beyond the borders of the United States, these effects should be reported separately. The time frame for your analysis should cover a period long enough to encompass all the important benefits and costs likely to result from the rule."*

Congress creates statutes and executive agencies take actions every day that potentially impact people living abroad. While within the United States, our regulatory philosophy, as explained in EO 12866, instructs:

> *"Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to*

> *protect or improve the health and safety of the public, the environment, or the well-being of the American people."*

However, that regulatory philosophy may not be shared by foreign governments. Including international impacts in the cost-benefit considerations for federal regulations potentially incentivizes adversarial nations to take policy positions that harm the United States or enrich themselves disproportionately.

For example, if a regulatory structure within the United States constrains a particular type of economic activity due in part to international impacts, those regulations could potentially open up a market opportunity in those nations that do not share the same goals or political philosophy that led to the restriction, essentially negating any of the potential international benefits as classified by the rule. For this reason, international impacts, if they are to be considered, should be qualified separately from domestic impacts, given the highly interconnected and complex nature of international market dynamics.

> **Recommendation**: Retain the current requirement for international impacts to be considered separately but clarify that those impacts should be considered exhaustively.

OMB Should not Allow the Use of a Post-Statute Baseline

The proposed revisions state that, "[i]n general, an agency's first regulatory action implementing a new statutory authority should be . . . assessed against a pre-statutory baseline"; but if "substantial portions of a regulation . . . simply restate statutory requirements that are self-implementing even in the absence of the regulatory action or over which an agency clearly has little (or no) regulatory discretion, …[agencies]… may use a post-statutory baseline in" their analysis, in order to focus analytic efforts "on the discretionary elements of the action and potential alternatives." This is problematic for two key reasons.

First, this has the effect of potentially shifting otherwise major rulemaking efforts to below the economic significance threshold simply because an agency claims many of those impacts are directed by statute. Even statutory requirements seen as "self-implementing" do not render evaluation of those requirements unnecessary. Regulations developed by agencies are at the direction of statute. To allow agencies or OMB to exempt certain requirements from consideration based solely on the assertion that they are "self-implementing" would be misleading to the public when attempting to ascertain costs and benefits associated with the rule and with statute.

Second, by eliminating requirements that are specifically spelled out in statute, public transparency would be significantly harmed. Statutes are often not designed with specific

information about their implementation costs. As stewards of tax dollars, Congress bears the brunt of accountability for statues that are overly burdensome, expensive, or challenging to implement. With a regulatory impact analysis that focuses only on the discretionary elements of a rule, the public is robbed of information by which to evaluate the decisions made by their representatives. To maintain public transparency and ensure agencies do not inappropriately avoid OIRA review of their rulemakings, the proposed revisions should retain current pre-statutory baselines.

> **Recommendation**: Require a pre-statutory baseline be used in regulatory impact analyses and limit post-statute baselines only as separate, sensitivity analyses.

OMB Should Limit the Impact of Discount Rates to Overall Cost Benefit Analyses

Within the discount rate discussion, OMB takes extensive efforts to classify and characterize the different potential options and considerations for long-term rule impacts through the use of discount rates. While this discussion is valuable and potentially could have been an improvement over the current Circular A-4 by more accurately characterizing the shadow price of capital, the revision likely understates the cost of regulations. Replacing the current use of a 3% discount rate of time preference with 1.7% is an inappropriate weighting of long-term, hypothetical impacts over specific impacts on today's society.

Small fluctuations in discount rates can have dramatic impacts on the "potential" costs and benefits of a rulemaking, with high levels of uncertainty. A change of just 2% (from 1% to 3%) in the discount rate over a 100-year time horizon reduces the value of a capital investment by 86%. Considering these discount rates are intended to account for unknowable changes in the value of capital over time, through high levels of uncertainty, their influence should be generally reduced overall with respect to an analysis. The proposed revisions require agencies to "present the undiscounted annual time stream of benefits, costs, and transfers expected to result from a regulation, clearly identifying when they are expected to occur," which is certainly an improvement over the current Circular A-4 and should be maintained. But OMB should do more to ensure that discount rate analysis does not heavily skew the overall regulatory evaluations inappropriately.

The preamble states, "…there has been a persistent decline in real interest rates over the last 40 years; real interest rates on Treasury bonds had already fallen below 3% by 2003 and have remained lower than that level since then even as nominal rates have recently increased." While that trend may be relatively consistent over the last 40 years, data are available over a much longer period. Recent interest rate changes are evidence that the 40-year trend may not be a reliable indicator of future interest rate performance. Given the international market challenges currently being faced and recent interest rates, there is little rationale to assume that interest rates will stay below 3% for a prolonged period.

OMB proposes to implement an ostensibly more accurate and more effective methodology alongside its changes to discount rates by adopting a shadow price of capital factor. However, OMB unreasonably proposes to cap this factor at a high value of 1.2. While the Alliance supports the adoption of the shadow price of capital approach, especially if OMB ultimately adopts a lower default interest rate, limiting the shadow price of capital factor within the range of 1 to 1.2 completely negates any accuracy benefit that would come from using the alternate approach. The shadow price of capital approach is supposed to account for the displacement of capital, which has typically been represented by the 7% rate, but limiting the factor artificially reduces that capital displacement rate to below the current rate for displacement of consumption, which would not be supported even by the literature the current draft references. The Alliance instead suggests that if OMB intends to cap the range of the shadow price of capital, then it should maintain the existing 3% and 7% evaluation rates and include a regulation-specific third rate that is adjusted by the shadow price of capital factor. This approach would allow regulatory actions to be accurately compared against one another and provide a transparent approach to the public and policymakers. Alternatively, OMB could implement an uncapped shadow price of capital factor that allowed for the assessment to include displacement of capital effects.

> **Recommendation:** OMB should direct agencies to use a 3% discount rate, a 7% discount rate, and a regulation-specific shadow price of capital factor, or alternatively, use a shadow price of capital factor that is not capped at 1.2 to reflect the specific action's displacement effect.

Conclusion

Western Energy Alliance appreciates the opportunity to provide comments and recommendations to improve the Circular and focus on the most economically efficient result. As proposed, the revisions could alter policymaking decisions in a way that would result in less net public benefit than if the Circular were to remain unchanged by inappropriately justifying costly near-term actions through future benefits that are uncertain in timing and value.

Sincerely,

Kathleen M. Sgamma
President